the necessity of an unalterable attitude during all conditions, on the one hand, or as the only other alternative, the complete abandonment of such constitutional guaranties during time of war, show little knowledge of our constitutional law and its development during recent years at the hands, among others, of the two Justices, Brandeis and Holmes, dissenting in this case. See, for example, the opinions of Mr. Justice Holmes in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, and *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, especially pages 364-66. See also E. S. Corwin in 30 YALE L. JOUR. 48; Carroll, "Freedom of Speech and Press in the Federalist Period," 18 MICH. L. REV. 615; Wigmore, 14 ILL. L. REV. 539; Goodrich, 19 MICH. L. REV. 487; Chafee, 32 HARV. L. REV. 932. Upon the fundamental question here involved, this REVIEW plans to make a more comprehensive statement, in the near future. H. M. B.

WORKMEN'S COMPENSATION—COMPULSORY STATUTES AND DUE PROCESS.—Modern workmen's compensation acts are of European inception, the first of them having been enacted in Germany in 1884. This has been amended and extended from time to time until as late as 1911. The British Compensation Act was passed by Parliament in 1897. Its scope has been greatly extended by amendments in 1900 and 1906, and by supplemental legislation in 1912. At the present time compensation acts of one sort or another are in force in practically all the European countries. 1 BRADBURY'S WORKMAN'S COMPENSATION, (2nd ed.) 7; BOYD, WORKMEN'S COMPENSATION, § 8.

The movement for the enactment of such laws became widespread in the United States about the beginning of the present century, and bore first fruit in the federal act of 1908, the Montana act of 1909, and the first New York act of 1910. The succeeding ten years have witnessed a very extensive acceptance of the compensation idea, so that at present there are workmen's compensation acts of various sorts upon the statute books of more than thirty of our states.

While the American statutes present many types which differ more or less from one another yet all fall clearly into one or the other of two general classes: (1) optional statutes, in which the employer does not come under the act unless he so elects, but in which he is deprived of certain common law defenses in failure of such election; and (2) compulsory statutes. The great majority of the state statutes are of the optional or elective variety, and such laws have universally been upheld in the face of constitutional objections. L. R. A. 1916A, 414. Compulsory statutes, on the other hand, have been enacted in but five states,—New York (2 statutes), Washington, California, Montana and Ohio. It is with this type of law that the present note has to do, and more particularly with the constitutional objection urged against such acts that they effect a taking of property without due process of law.

The first of these statutes to receive judicial review was the New York act of 1910, (Laws of 1910, c. 674), which came before the Court of Appeals in the case of *Ives* v. *South Buffalo Ry. Co.* (1911), 201 N. Y. 271. The constitutionality of the act was attacked under both the State and Federal Con-

stitutions on the ground, *inter alia,* that it constituted a taking of property without due process of law. In holding the act invalid the court based its decision squarely upon the broad ground that the imposition upon the employer of liability without fault was in derogation of the due process clause of the State Constitution, and that the statute was not justifiable as a valid exercise of the police power because it did not tend to contribute directly to the promotion of the general welfare. The act in question, which provided for direct payment by employers to their injured employees of the benefits provided therein, was also subject to the same objection which later proved the stumbling block of the Montana act, namely, that the employee's common law remedies against the employer were preserved, thus exposing the employer to a double liability. See *Cunningham* v. *Northwestern Improvement Co., post.* But the court in the *Ives Case* made no point of this feature. Nor was the finding in this case in any sense an adjudication of the validity of the act under the 14th amendment of the Federal Constitution, although it has been sometimes cited in that regard. The court expressly say that *Noble State Bank* v. *Haskell,* 219 U. S. 104, is controlling as to the federal aspect of the case, and further that a finding of invalidity under the State Constitution is sufficient for the purposes of the decision.

Four months after the decision in the *Ives Case,* the Supreme Court of Washington handed down a decision upholding the compensation act of that state, (Laws of 1911, p. 345), in *State, ex rel. Davis-Smith Co.* v. *Clausen* (1911), 65 Wash. 156. Instead of the direct payment plan of the New York act this statute provided for compulsory payments into a state insurance fund. The only effect of this difference, as far as the constitutional question was concerned, was to give rise to an additional objection to the act which could not be made to the New York law, namely, that the statute takes the property of one employer to pay the obligations of another. The court concedes at the outset that there is a basis in fact for both this objection and that other objection which was finally controlling in the *Ives Case,* that the statute imposed liability without fault. "But," the court goes on to say, "These contentions do not furnish an absolute test of the validity of the act. * * * The test of the validity of such a law is not found in the inquiry, Does it do the objectionable things? but is found rather in the inquiry, Is there no reasonable ground to believe that the public safety, health or general welfare is promoted thereby?" In holding that public welfare was promoted, by a removal of the burden of industrial injuries from the workman and his dependents, thus lessening indigency, and placing it upon the employer and through him, by means of adjustment of the prices of his commodity, upon the consuming public, the court takes a stand sharply at variance with that of the New York Court of Appeals in the *Ives Case.* It is not necessary to the validity of a statute under the police power, say the Washington Court, that it should be "*directly* designed to conserve health, safety, comfort, peace and order," but on the other hand, quoting from *Noble State Bank* v. *Haskell, supra,* "An *ulterior* public advantage may justify a comparatively insignificant taking of private property for what, in its *immediate* purpose, is a private use."

The Montana act, (Laws of 1909, c. 67, p. 81), was held invalid in *Cun-*

ningham v. *Northwestern Improvement Co.* (1911), 44 Mont. 180, solely on the ground that it preserved to the employee his common law right of action against the employer for injuries due to the latter's negligence, and thus exposed the employer to a double liability and so deprived him of the equal protection of the laws. As to the due process aspect of the case, the court is fully as broad in its views as the Washington Court in the *Clausen Case,* the opinion in which is quoted from with approval and at considerable length. "Any measure," says the court, "which tends to minimize indigency, of necessity raises the general standard of the people." The court also quotes with approval the comprehensive definition of police power laid down in the *Noble Bank Case* by Justice Holmes in the following words: "It may be said in a general way that the police power extends to all the great public needs. (*Camfield* v. *United States,* 167 U. S. 518.) It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The next case to arise was *State of Washington* v. *Mountain Timber Co.,* decided by the Supreme Court of Washington in 1913 and reported in 75 Wash. 581. The decision in the state court amounts to nothing more than a reaffirmance of the position taken in the *Clausen Case.* The case was taken to the Supreme Court of the United States on error, and the decision there will be considered presently.

In 1915 the second New York compensation law, (Laws of 1914, c. 41), came before the Court of Appeals and was upheld in *Jensen* v. *Southern Pacific Co.,* 215 N. Y. 514. This act provided for compulsory contribution to a state insurance fund except in cases of employers who should insure with private indemnity companies or who should be shown to be of sufficient financial ability to render certain the payment by them directly to their injured employees of the benefits conferred under the act. The double liability objection was not present inasmuch as the liability prescribed in the act was made exclusive. Also, it is to be noted that by an amendment to the New York Constitution in 1913 compulsory compensation acts were expressly authorized, so the due process question under the state constitution was eliminated. In passing upon the federal question the court considered itself bound by the decision in the *Noble Bank Case.* Thus, the *Jensen Case* cannot be considered as being in conflict with the *Ives Case;* and yet a decided change of attitude is apparent from an examination of the two opinions. While not expressly relinquishing the position that a statute must directly tend to promote the public welfare in order to be sustainable as a valid exercise of the police power, the court affirm that the act under consideration is sufficiently direct in its application to such object to render it unobjectionable, which in effect amounts to the same thing. They say, "A compulsory scheme of insurance to secure injured workmen in hazardous employments and their dependents from becoming objects of charity certainly promotes the public welfare as directly as does an insurance of bank depositors from loss," (referring to the *Noble Bank Case*).

The California statute, (Stat. of 1913, p. 279), which, like the second New

York act, was passed pursuant to the authority of a constitutional amendment, was sustained in *Western Indemnity Co.* v. *Pillsbury* (1915), 170 Cal. 686. It provided for compulsory direct payment, with an option to insure in either a state fund or a private indemnity company. The court directs attention to the distinction taken in the *Ives Case* between the fellow-servant, contributory negligence and assumption of risk rules on one side, and the rule that fault on the part of the employer must be shown, on the other. "Why this distinction?" asks the court. "Is the latter doctrine any more sacred or inherently necessary than any of the former?" The court thinks not, and is clear that there is no fundamental inhibition on the legislature in the one case any more than in the other.

The first adjudication on any of these statutes in the Supreme Court of the United States was the decision in *New York Cent. Ry. Co.* v. *White* (1917), 243 U. S. 188, upholding the second New York act. The court concedes that there is a taking, but justifies it as a proper exercise of the police power of the state. "And for this reason: The subject-matter * * * is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. * * * When the individual health, safety and welfare are sacrificed or neglected, the state must suffer. (*Holden* v. *Hardy*, 169 U. S. 366.) * * * One of the grounds of its [the public's] concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime." In holding that the statute is not arbitrary or unreasonable the court follows the reasoning of the Washington Court in the *Clausen Case*, namely, that industry itself is responsible for the injuries to workmen and should therefore stand the burden imposed by such injuries. "The loss of earning power, * * * however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that is ordinarily paid by the employer."

The Washington act was sustained by a divided court in *Mountain Timber Co.* v. *State of Washington* (1917), 243 U. S. 219, the Chief Justice and Justices McKenna, Van Devanter and McReynolds disenting. If this act merely substituted one form of employer's liability for another the points raised against it would be sufficiently answered by the decision in *New York Cent. Ry. Co.* v. *White, supra,* but the Washington law goes farther and enforces contribution from all designated employers regardless of whether injuries have occurred to their employees or not. This, in its practical operation, may often require the most careful employers to pay indemnity to the injured employees of their negligent competitors. The answer which the court makes to this objection is that the nature of the industries embraced in the act is such that there can, in the nature of things, be no assurance of immunity from personal injuries, even in the most carefully managed plants. It therefore follows, in view of the unforeseeability of such accidents and the practical inability to insure against them by careful management, that it is neither arbitrary nor unreasonable to place the burden of such accidents upon the industries as a whole, compelling each unit to contribute its ratable share. To

the point that such an arrangement is not novel in the law, the court cites a number of examples. *Noble State Bank* v. *Haskell, supra,* (all banks taxed to make up a fund out of which to reimburse depositors of a failing bank); *Kane* v. *New Jersey,* 242 U. S. 160, (automobile license tax to improve roads); *Horn* v. *People,* 46 Mich. 183, (tax on dogs to create a fund out of which to pay sheep owners whose sheep are killed by dogs); *Holst* v. *Roe,* 39 Oh. St. 340, (same).

The recent case of *Thornton* v. *Duffy,* (Sup. Ct., 1920), 41 Sup. St. Rep. 137, brought before the court a question which, in its constitutional aspects, is no different from that presented in the *Mountain Timber Case.* The Ohio Workmen's Compensation Law was involved. This act, as originally passed (103 Ohio Laws, 72), provided for compulsory contribution to a state insurance fund except in cases of employers who should be shown to be of sufficient financial ability to make direct payment to injured employees, which employers should, upon deposit of security with the Commission, be allowed to settle directly. Whether an employer in any given case was of the requisite financial ability was to be determined as a finding of fact by the Commission. By § 22 of the act, the Commission was authorized to "at any time change or modify its findings of fact * * * if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all of the provisions of this act." By an amendment in 1917, (107 Ohio Laws 159), the legislature withdrew the privilege of direct payment from all employers who should insure themselves in private indemnity companies or otherwise. The Commission accordingly changed certain of its findings of fact, and it was claimed that such changes, as well as the amendment in pursuance to which they were made, deprived employers who had made contracts of insurance of property without due process of law under the 14th amendment. (The state question is disposed of by a constitutional provision. Art. II, sec. 35.) After holding that the express reservation in § 22 authorized a withdrawal of the option of direct settlement, and that no inviolable property rights had been acquired by reliance upon its extension in the first instance, the court disposes of the case very briefly upon the authority of the *Mountain Timber Case.*

Statutes of the type of the second New York act would seem to be quite clearly justifiable under the police power as it has been understood. The object is obviously of general concern, and it is neither arbitrary nor unreasonable to require the industries causing the injuries to assume the burden thereof. It is simply a substitution of one form of liability for another,—merely a legislative change in the rules of law applicable to industrial accidents,—and no person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit. *Munn* v. *Illinois,* 94 U. S. 113; *Hurtado* v. *California,* 110 U. S. 516.

It is not so easy, however, to justify the additional step of forcing an employer to contribute regardless of the effect of his plant in producing the injuries compensated, as is done in the Washington and Ohio acts. In its final analysis this is nothing less than taking the property of one employer to pay the obligations of another, and in its practical effect it must necessarily operate to force the careful employer to assist in maintaining his negligent

rival in business. To this objection the court in the *Mountain Timber Case* answer that such accidents are inevitable even in the most carefully managed plants and that it is therefore reasonable to impose the burden upon the industry as a whole. With all due respect to the learned justice who delivered the opinion, the conclusion seems too broad to be sustained by the premise. Granting such injuries are inevitable, their frequency is certainly much higher in a negligently managed plant than in one which is carefully managed. The frequency of accidents can hardly be said to be uncertain in any given plant as compared with any other plant. But even if such uncertainty does exist, the mere fact that such a comparison will show a higher frequency of accidents in one plant than in another of approximately the same size and equipment would seem to make it unreasonable to require contribution on any such basis as the payroll of the plant.

The case of a tax on dogs to create a fund to reimburse sheep owners for sheep killed by dogs offers no analogy, for here there is a very real difficulty, if not an impossibility, in tracing the source of the damage sustained. The same may be said of the automobile license case, where it is apparently impossible to determine in what proportion various automobile owners enjoy the highway.

It has been suggested, (65 U. OF PA. L. REV. 682), that the *Noble State Bank Case* is distinguishable by reason of the mutual interdependence of banks, by reason of which careless management in any one may ruin any other. But it is believed that as a matter of practical experience it is generally, if not always, the bank in which negligent or dishonest methods are followed that becomes insolvent. This basis of distinction would therefore seem to be without merit. It is also pointed out in the same source that the regulation to which banks are subject guarantees a certain minimum of careful management in all banks, which is not the case in industry generally. This objection can be overcome, and has already been overcome to a large extent, by legislative regulation of industry, principally by way of requiring the adoption and use of mechanical safety devices and other cautionary and preventative measures. Another writer has attempted to distinguish the cases on the ground that a bank can cause but one loss, it being then insolvent, while a particular industrial plant may continue to operate and cause successive losses. See 84 CENT. L. JOUR. 245. This distinction, if it be one at all, goes simply to the matter of degree, and it is impossible to see why such a difference should make the arrangement arbitrary in one case and not in the other. It would seem that, although the *Noble State Bank Case* was a somewhat stronger case, it properly was considered as controlling in the *Mountain Timber Case*. What has been said in regard to the latter case is of course true with regard to *Thornton* v. *Duffy, supra,* which was decided on grounds of *stare decisis.*

That the decisions in these cases do effect an extension of the limits of the police power and reduce the compass of rights protected by the due process clause of the constitution can hardly be doubted. It may be said, and not without a semblance of reason, that such decisions effect an encroach-

ment, the ultimate result of which may be to render the constitutional guaranties illusory or wholly to abrogate them. It seems a sufficient answer to say that if and when such a result is accomplished it will be because it is "the expression of social, economic and political conditions," and that "by the prevailing morality or strong and preponderant opinion" such guaranties are no longer necessary. FREUND, POLICE POWER, § 3; *Noble State Bank* v. *Haskell, supra.* Nor should we deprecate the prospect of such a state of affairs, for after all "The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient." HOLMES, THE COMMON LAW, p. 1. And it is right that it should be so, for laws are made for man, not man for laws. L. H. M.

RIGHT TO SUE IN TORT FOR NEGLIGENT DELAY OF INSURANCE AGENT IN FORWARDING APPLICATION TO HOME OFFICE.—In cases where an insurance agent negligently delays in sending in an application for an insurance policy to the home office, and the thing sought to be insured is destroyed before the application is acted upon, it would seem illogical to hold that there is a liability on the part of the company for such negligence of its agent. It is a well established rule that an insurance company may reject an application for insurance without giving any reason for so doing. That being so, it is difficult to see any basis for imposing a tort liability on the company for negligent delay in acting upon such an application. But on such a state of facts it has been held that the company was liable in a tort action brought by the applicant, based upon the negligence of the agent in failing to forward the application within a reasonable time. *Boyer* v. *State Farmers' Mutual Hail Ins. Co.,* 86 Kan. 422. In that case Boyer applied for insurance on a growing crop of corn, against damages by hail. The agent negligently delayed in sending in the application, and in the meantime the crop was destroyed by a hailstorm. In allowing a recovery the court distinctly states that the action is not in contract, but is based upon the negligence of the company's agent in not forwarding the application until too late to be of any benefit to the applicant. This decision was followed in *Wilkin* v. *Capital Fire Ins. Co.,* 99 Neb. 828, three justices dissenting, but the same court later reversed itself in *Meyer* v. *Central State Life Ins. Co.,* 103 Neb. 640. By statute it may be provided that an application for such insurance shall be deemed accepted unless rejected within a specified time. See *Wanberg* v. *Ins. Co.,* (N. Dak.), 179 N. W. 666, 19 MICH. L. REV. 340.

A further difficulty is presented where the application is for a policy of life insurance. Where the agent, in such a case, negligently delays in sending in the application, and the applicant dies before his application has been acted upon, it would seem that an action of tort, brought by the administrator of his estate, could not under any circumstances be maintained. And yet, on precisely that state of facts, the Supreme Court of Iowa allowed a recovery by the administrator. *Duffie* v. *Bankers Life Ass'n.,* 160 Ia. 19. In that case it was held that it is the duty of an insurance company to act promptly on an application for insurance, and to notify the applicant of its